

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

SIEW V. THONG, YUE F. XIA, QIAO F. CHEN,

Plaintiffs,

08-CV-3469
(TCP)(WDW)

-against-

ECF Case

LOVELY NAILS NY INC. d/b/a "LOVELY NAILS",
NEW ALWAYS NAILS CORP. d/b/a "Always Is Nails",
MAJOONGMOL CORP. d/b/a "Always is Nails",
JH DIVA NAIL & SPA INC. d/b/a "Diva Nails",
VIA NAILS & SPA, INC d/b/a "Diva Nails",
QUIXING LI a/k/a "John Lee", GUINING CUI a/k/a
"Susan Lee" and Ying Ai Che a/k/a Young He Cha.

**NOTICE OF MOTION
PURSUANT TO
FRCP 12(b)(6)
TO DISMISS
PLAINTIFFS' SECOND
AMENDED COMPLAINT**

Defendants.

PLEASE TAKE NOTICE, that upon the Declaration of Susan Ghim, Esq. dated September 28, 2009, the deposition of Ying Ai Che sworn to on September 22, 2009 with attached exhibits, the accompanying Memorandum of Law, and upon all prior pleadings and proceedings in this action, the Defendant, Ying Ai Che will move before the Honorable Thomas C. Platt, U.S.D.J., at the United States Courthouse, 1044 Federal Plaza, Central Islip, NY 11722, at a date and time to be determined by the Court, for an order pursuant to Fed.R.Civ.P. 12(b)(6) dismissing Plaintiffs' Second Amended Complaint ("SAC") in its entirety and this action with prejudice as against Defendant Ying Ai Che, doing business at 240 Hempstead Road, Hempstead, New York, on the grounds that:

(1) Plaintiffs have failed to plead facts sufficient to allege and/or establish any employee-employer relationship with Ms. Che and/or DIVA NAIL & SPA YA, Inc., under the Fair Labor

Standards Act (“FLSA”), 29 USC § 201, et seq., and pendant New York State Labor Laws and New York state race/ ethnic/ age discrimination laws.

(2) Without a federal claim against Ms. Che, this Court should dismiss all New York state claims under NYLL, NYDCL and Executive Law for lack of subject matter or supplemental jurisdiction under 28 USC 1367(c) .

(3) In the alternative, Plaintiffs have failed to plead facts to allege and/or establish a claim of fraudulent conveyance under New York State Debtor Creditor Law § 270 et seq. because as to actual intent under NYDCL 276, plaintiffs have failed to plead facts with any specificity and sufficient to allege that Defendant Ying Ai Che had knowledge of the existence of plaintiffs and their labor dispute with other defendants or any “badges of fraud.” As to constructive fraudulent conveyance under NYDCL 273, plaintiffs have failed to plead facts sufficient to allege “inadequate consideration,” “lack of good faith,” or “insolvency of the debtor.”

(4) Plaintiffs have failed to plead facts to allege and/or establish with any facts or competent evidence that the Corporate Veil should be pierced on Diva Nail & Spa YA, Inc. as to render Ms. Che personally liable for any conduct as alleged by Plaintiffs.

(5) Plaintiffs have failed to plead facts sufficient to allege and/or establish a joint-employer, successor, agency or aider and abettor relationship between defendant Ms. Che and other named defendants or that Ms. Che owed any fiduciary duty to plaintiffs as to render Ms. Che personally, jointly or severally liable to the plaintiffs.

(6) Plaintiffs have pleaded only legal conclusions and conclusory allegations which are insufficient to plead fraud with particularity and under FRCP Rule 8(a).

Based on the foregoing, Ms. Che prays that this Court grant a dismissal with prejudice as to all federal and state claims and other just and further relief as this Court deems proper.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 6.1(b) of the Local Civil Rules of the U.S. District Courts for the Southern and Eastern Districts of New York, opposing affidavits, answering memoranda of law and any other papers in opposition to the above motion, if any, are required to be served upon the undersigned within ten business days after service of this motion.

Dated: New York, New York
 September 28, 2009

Respectfully submitted,

By: /S
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